No. 545

Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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Appellants will reply to several of the points made by appellees in their motion to dismiss this appeal which is being taken from the Court of Appeals of the State of New York.

Appellees' Statement of the Case is Inaccurate

On page 3 of their motion to dismiss, appellees misstate the genesis of Section 9 of Ch. 531.

They say that the Moreland Act Commission found that prices to wholesalers and retailers in New York State were higher than like prices in other states and that because of this the Commission recommended that Section 9 of Chapter 531—the no higher than the lowest price section—be enacted in order to reduce prices in New York to a level comparable with prices in other states.

But this is not the fact. The Moreland Act Commission found that any higher prices in New York resulted from the fact that under old Section 101-c of the New York Alcoholic Beverage Control Law (hereinafter cited as the ABC Law) resale price maintenance was mandatory. The Commission recommended its repeal. This was achieved by Section 11 of Chapter 531, 1964 New York Session Laws.

The no higher than the lowest price provisions contained in Section 9 were never in any way recommended or suggested by the Moreland Act Commission nor were they enacted by the Legislature for the purpose claimed by appellees. In fact, far from recommending or suggesting its enactment, Judge Lawrence E. Walsh, Chairman of the Commission, suggested that such maximum price provisions might well be unconstitutional. As Section 8 of Chapter 531, reproduced in appellees' motion at pp. 48-49, clearly points out, Section 9 was enacted solely "to forestall possible monopolistic and anti-competitive practices" which might arise in the future.

To reiterate, Section 9 was not enacted for the purpose of reducing prices in New York to wholesalers and consumers. The repeal of Section 101-c was the measure enacted for this purpose; the repeal of that section is not challenged here. Section 9 was enacted to prevent restric-

tive pricing practices which might arise in the future but which neither the Legislature nor the Moreland Act Commission claimed existed before or at the time of passage of the Act.

Appellees' Views on the Applicability of the Twenty-first Amendment and Violations of the Commerce Clause are in Error

As appellants acknowledged in their Jurisdictional Statement, early cases of this Court seem to imply that the commerce clause must be restrictively applied to state statutes which affect the sale of alcoholic beverages only within the legislating state. See appellants' Jurisdictional Statement, pp. 24-25. But it does not follow from this, as appellees contend, that the commerce clause has been read out of the Constitution in so far as alcoholic beverages are concerned.

Appellees attempt to vitiate the impact of cases such as *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 24 (1964) and *Department of Revenue* v. *Beam Distilling Co.*, 377 U. S. 341 (1964). They quote general introductory statements of the opinions which merely reaffirm that a state is empowered to pass legislation having an impact solely within its own borders without regard to burdens upon interstate commerce. However, these quotations cannot detract from the significance of these two cases, for both recognize that the commerce clause is still applicable when alcoholic beverage legislation is at issue.

Furthermore, appellees choose to ignore the significance of the decisions of this Court in *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) and *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946). It is understandable why

appellees have overlooked these cases, for they clearly contradict appellees' position as to the scope of the Twenty-first Amendment. Appellees also fail to meet appellants' demonstration of the immediate and substantial effect Section 9 of Ch. 531 will have upon the prices of alcoholic beverages in other states. As appellants pointed out, this alone is sufficient to distinguish the early cases construing the interrelationship between the Twenty-first Amendment and the commerce clause.

On page 7 of their motion, appellees go on to state that, even if the legislation in question were not sanctioned by the Twenty-first Amendment, the commerce clause would be no barrier to Section 9 of Ch. 531. Appellees then cite five cases, apparently in an effort to contradict the authority offered by appellants in their Jurisdictional Statement on pp. 39-44.

Not one of the five cases cited by appellees alleges a violation of the commerce clause, Article 1, Section 8, of the federal constitution. Each of these cases concerned a constitutional challenge based upon the Fourteenth Amendment and alleged either a deprivation of due process of law or a denial of the equal protection of the laws. Thus, appellees have yet to contradict the assertions of appellants' Jurisdictional Statement contained on pp. 39-44.

Appellees' Misconception of the Purpose of Section 9 of Chapter 531 is Responsible for Their Position That the Sherman and Robinson-Patman Acts are Not Applicable in This Action

On page 7 of their motion to dismiss, appellees state that the Sherman and Robinson-Patman Acts are "irrelative

[sic] to the statute here. Therefore there is no issue under the Supremacy Clause of the Constitution."

Appellees' first contention supporting the alleged irrelevance of these acts to the proceedings at issue is that Section 9 of Chapter 531 and the entire New York Alcoholic Beverage Control Law concerns only intrastate commerce. But appellees *ipse dixit* does not make it so. Appellants' Jurisdictional Statement fully documents the substantiality of the question.

Appellees next contend that such acts are irrelevant because "the statute does not act upon monopolistic or anti-competitive practices as does the Sherman Act. It is not an anti-monopoly statute."

Not only does Section 8 of Ch. 531 flatly contradict this assertion but, as we have shown in our Jurisdictional Statement, Section 9 of Chapter 531 has severe interstate consequences and seeks, to use appellees' phrase, to deter "monopolistic or anti-competitive practices, as does the Sherman Act." This is so because New York State is by far the largest liquor market in the country and the effect of Section 9, among other things, will be—as both the majority and minority opinions of the New York State Court of Appeals made clear—the raising of prices throughout the country rather than a reduction of prices in New York. This result must inevitably flow from a situation such as Section 9 presents, where a competitor is prevented from granting price differentials to customers throughout the country in a "good faith" attempt to meet competition without reducing his prices in New York.

The right to reduce prices under such circumstances is one of the essentials sought to be preserved by the federal

antitrust laws. The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, in its discussion of "The 'Good Faith' Meeting of Competition Defense", states at page 181:

> Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any anti-price discrimination law. For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy." Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act.

Appellees' Contentions Concerning the Scope of the Due Process and Equal Protection Clauses are Inconclusive and Lack Substance

Appellees' contentions concerning the scope of the due process and equal protection clauses of the Constitution are without substance. We reiterate that as Section 9 of Chapter 531 does not affirmatively promote temperance, it is a denial of due process of law to place maximum price limitations upon appellants' sales in New York. The promotion of temperance is the sole rationale for legislation restricting the sale of alcoholic beverages in the State of New York. See ABC Law, § 2. Section 2 in effect establishes the promotion of temperance as the due process,

police power standard for New York alcoholic beverage control legislation.

However, this maximum price legislation does not satisfy even a general substantive due process standard.

An examination of judicial precedent upholding maximum legislation shows that these cases break down into two categories. First there are the cases which deal with essential goods, *e.g., Nebbia* v. *New York,* 291 U. S. 502 (1934). Then there are cases which uphold maximum price limitations because of industry abuses which can be corrected only by this device. See *Gold* v. *Di Carlo,* 235 F. Supp. 817 (S. D. N. Y.), *aff'd,* 380 U. S. 520 (1965). It is readily apparent that Section 9 of Ch. 531 fits neither of these categories.

If the entirety of appellees' constitutional argument is considered, it becomes clear that appellees believe members of the alcoholic beverage industry are bereft of the right to challenge state alcoholic beverage legislation on any constitutional ground. Members of this industry, appellees would submit, are for some unexplained reason not entitled to rely upon the constitutional guarantees available to those in other businesses. Appellees would have it believed that the Twenty-first Amendment removes any constitutional challenge, based upon either the commerce or supremacy clauses, to any state alcoholic beverage legislation.

Similarly, in considering whether any such legislation comports with due process standards, appellees would have judicial inquiry cease once it had been asserted that the state legislature passed the bill in the belief that it was acting for the benefit of society.

The acceptance of these positions, of course, would mean that there can be no meaningful judicial review of any state alcoholic beverage legislation. It does not follow that because constitutionally a state can entirely prohibit the sale of alcoholic beverages, it is free to impose the most onerous and unreasonable burdens upon industry members if it permits the sale of these beverages.

Appellees claim that this particular legislation benefits the general welfare solely because it will immediately result in lower prices to consumers in New York. Aside from the fact that this is neither the purpose nor the probable result of Section 9 (see pp. 2, 5, *supra*), it is submitted that this argument can be applied to legislation dealing with any commodity. If this argument as to the scope of power to legislate on behalf of the "general welfare" is accepted, then the due process clause can be no barrier to legislation similar in construction to Section 9 which fixes the maximum prices of automobiles, television sets and the like. Appellants submit that this type of legislation is yet to be deemed a proper exercise of a state's police power.

Likewise, appellees' argument that Section 9 of Ch. 531 does not deny appellants the equal protection of the laws begs the question. Appellees state that this clause of the Constitution does not require things which are different in fact to be treated in law as though they were the same. But this was not appellants' contention (see appellants' Jurisdictional Statement, pp. 60-62). Appellants contention was and is that there is no substantial difference between New York wholesalers who do an indeterminate amount of their business with a certain distiller and those New York wholesalers who do a lesser percentage of their business with the same distiller. Nevertheless, by the terms

of Section 9, the former are subject to limitations on their prices while the latter are free to set a price of their own choice.

Conclusion

Probable jurisdiction should be noted in this case as it presents federal questions of sufficient substantiality to warrant review by this Court.

Respectfully submitted,

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